FOR ARGUMENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

EXXON PIPELINE COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

BP PIPELINES, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

ARCO PIPE LINE COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77–452

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

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***ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

## BRIEF FOR THE FEDERAL RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (A. 746a–A. 771a) is reported at 557 F. 2d 775. The principal order of the Interstate Commerce Commission (A. 623a–646a) is reported at 355 I.C.C. 80.

### JURISDICTION

The judgment of the court of appeals (A. 772a) was entered on July 29, 1977. A timely petition for rehearing was denied on September 8, 1977 (A. 774a). The petitions for a writ of certiorari in Nos. 77–452 and 77–457 were filed on September 22, 1977, the petition in No. 77–551 was filed on October 12, 1977, and the petition in No. 77–602 was filed on October 25, 1977. The petitions were granted on November 28, 1977 (A. 789a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a).

### QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission had authority under Section 15(7) of the Interstate Commerce Act to suspend for seven months the operation of initial schedules stating new rates for the interstate transportation of crude oil by pipeline.

2. Whether the Commission had authority to allow interim rates for such transportation to go into effect during the suspension period and to announce in advance the maximum interim rate level it would be willing to accept without suspension.



3. Whether the Commission had authority to condition its acceptance of a carrier's interim rate filing without suspension on the carrier's agreement to refund the portion of any charges it collects in excess of what may later be found, after a full hearing pursuant to Section 15(1) of the Act, to be the just and reasonable rate level.

### STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission that (1) suspended for seven months the operation of tariffs filed by petitioners stating new rates for the transportation of crude oil through the Trans-Alaska Pipeline System (TAPS), (2) instituted an investigation into the lawfulness of the rates contained in the suspended tariffs, and (3) authorized petitioners to file tariffs stating reduced interim rates for the suspension period.

#### A. STATUTORY FRAMEWORK

Congress has declared that "the national transportation policy [is] * * * to encourage the establishment and maintenance of reasonable charges for transportation services." 54 Stat. 899, note preceding 49 U.S.C. 1. It has directed that "[a]ll of the provisions of [the Interstate Commerce] Act shall be administered and enforced with a view to carrying out the above declaration of policy" (*ibid.*).

Part I of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1–27, applies to common

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carriers, such as petitioners, engaged in the interstate transportation of oil by pipeline, 49 U.S.C. 1(1).[1] It provides that "[a]ll charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 U.S.C. 1(5). This fundamental requirement that all rates be just and reasonable is enforced by provisions imposing filing requirements on carriers, giving injured persons prospective and retrospective remedies, and empowering the Commission to block or eliminate unjust or unreasonable charges.

Neither the petitioners nor any other common carrier subject to Part I of the Act may lawfully en-

[1] Part I of the Act also applies to interstate transportation of passengers or property by railroad and certain other commodities by pipeline. Part II of the Act, 49 Stat. 584, as amended, 49 U.S.C. 301–327, applies to the interstate transportation of passengers or property by motor carriers. Part III of the Act, 54 Stat. 929, as added and amended, 49 U.S.C. 901–923, applies to the interstate transportation of passengers or property by water carriers. Part IV of the Act, 56 Stat. 284, as added and amended, 49 U.S.C. 1001–1022, applies to freight forwarders.

Administration of Part I of the Act, insofar as it applies to the transportation of oil by pipeline, was transferred from the Interstate Commerce Commission to the Department of Energy and the Federal Energy Regulatory Commission on October 1, 1977, pursuant to the Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). The investigation of TAPS rates instituted by the Interstate Commerce Commission is continuing before the Federal Energy Regulatory Commission. Unless the context indicates otherwise, references in this brief to the "Commission" denote both Commissions.



gage in interstate transportation unless the applicable rates, fares, and charges have been filed and published in accordance with the Act's provisions. 49 U.S.C. 6(1), 6(7). No change may be made in the rates, fares, or charges filed with the Commission except on appropriate notice to the Commission and the public through the advance filing of schedules showing the proposed changes. 49 U.S.C. 6(3).

The Commission is empowered to investigate, either on its own initiative or on complaint of any person, the lawfulness of any rate, fare, or charge. 49 U.S.C. 13(1), 15(1). If "after full hearing" the Commission finds that any rate is unjust, unreasonable, or otherwise unlawful, it is "empowered to determine and prescribe what will be the just and reasonable * * * rate, fare, or charge * * * to be thereafter observed * * *, and to make an order that the carrier or carriers shall cease and desist from such violation * * *." 49 U.S.C. 15(1). Any carrier who violates the Act's provisions "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation * * *." 49 U.S.C. 8.[2]

The Act thus provides both prospective relief (the Commission's authority to prescribe reasonable rates and set aside unreasonable ones) and retrospective re-

[2] An injured person may seek to recover such damages either by filing a complaint with the Commission or by bringing an action in an appropriate United States District Court. 49 U.S.C. 9, 13(1), 16(1); 28 U.S.C. 1337.

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lief (damages to persons injured by unlawful rates). Recognizing that even these remedies are not sufficient to protect the public interest fully, Congress enacted the Mann-Elkins Act of 1910, 36 Stat. 539, 552, which empowered the Commission to suspend proposed rates pending investigation. This statute is at the heart of this case. The current version provides (49 U.S.C. 15(7)):

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, * * * the Commission shall have * * * authority * * * to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge * * *; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier * * * a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge, * * * but not for a longer period than seven months beyond the time when it would otherwise go into effect * * *.

If the suspension period expires before the investigation is concluded, "the proposed change of rate, fare, [or] charge * * * shall go into effect," subject to the Commission's power, in certain situations, to order the carrier to keep account of all amounts received by reason of an increased charge and to order the carrier to refund any portion of the rate that is found not justified.



### B. PROCEEDINGS BEFORE THE COMMISSION

Eight owner-carriers built the Trans-Alaska Pipeline System to transport crude oil some 800 miles from Prudhoe Bay on Alaska's North Slope to the port of Valdez on the Gulf of Alaska. Each of the owners holds an undivided interest in the pipeline, and each has an obligation to use its share of the pipeline's capacity as an independent common carrier.[3] Seven of the eight TAPS owners are affiliated with companies engaged in the production of North Slope oil.[4]

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[3] The background and facts of this case are fully set out in the brief of the State of Alaska and the Arctic Slope Regional Corp. ("Alaska Br."). In the interest of brevity, we substantially adopt the statement of that brief.

[4] The eight carriers, and their ownership shares, are: Sohio Pipe Line Co. (33.34%), ARCO Pipe Line Co. (21%), Exxon Pipeline Co. (20%), BP Pipelines Inc. (15.84%), Mobil Alaska Pipeline Co. (5%), Phillips Alaska Pipeline Corp. (1.66%), Union Alaska Pipeline Co. (1.66%), and Amerada Hess Pipeline Corp. (1.5%). A. 749a n. 3.

ARCO, Exxon, BP, and Mobil are petitioners in this case. Sohio, Union, and Amerada Hess are intervenors and have joined in the brief for the petitioners. Unless otherwise indicated, references to "petitioners" include the intervenors.

Phillips is not a party. Its case arose later, and it challenged the Commission's separate order in the Court of Appeals for the District of Columbia Circuit (No. 77-1741, filed August 17, 1977). That court is holding the case in abeyance pending this Court's decision in the present case.

All but one of the TAPS owners has access to substantial amounts of crude oil through affiliated companies engaged in production of the Alaskan North Slope oil. Petitioners' statement that British Petroleum Co., Ltd. has no access to crude oil "now in production" (Pet. Br. 5-6) is true but overlooks the fact that Sohio is bound by agreement with British Petroleum to tender oil to BP

The carriers filed with the Interstate Commerce Commission tariffs stating rates for the movement of oil.[5] The tariffs stated rates of from $6.04 to $6.44 per barrel of oil (A. 624a). The Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation, and the Commission's Bureau of Inves-

Pipelines Inc. to the extent of the latter's ownership of TAPS or in the alternative to lease the BP pipeline interest. Further, when Prudhoe Bay production reaches 1.2 million barrels a day (expected to occur in April 1978), BP will have a 54 percent stock interest in Sohio. 2 *Moody's Industrial Manual* 2882 (1977). Petitioners' listing of the State of Alaska as a participant in the Prudhoe Bay field also is misleading, because Alaska holds only a royalty interest rather than an equity interest in production. We have adjusted the table presented in petitioners' brief to reflect more accurately the ownership interests in production.

[In percentage]

| | Net equity interest in oil rim participating area of the Prudhoe Bay Unit | TAPS interest of subsidiary |
|---|---|---|
| Sohio/BP | 53.155 | 49.18 |
| Atlantic Richfield Co. | 20.274 | 21.00 |
| Exxon Corp. | 20.274 | 20.00 |
| Mobil Oil Corp. | 2.094 | 5.00 |
| Phillips Petroleum Corp. | 2.044 | 1.66 |
| Amerada Hess Corp. | .538 | 1.50 |
| Union Oil Co. of California | ------ | 1.66 |
| Ten other producers | 1.619 | ------ |
| Total | 100.000 | 100.00 |

[5] The tariffs were filed between May 27 and June 20, 1977, and contained effective dates ranging from June 20 to July 20, 1977 (A. 749a and n. 5).



tigations and Enforcement filed protests and petitions for suspension of the tariffs (A. 623a).[6]

Because of the importance of the proceeding, the Commission chose to consider the investigation and suspension issues itself instead of following the usual procedure of referring the matter to its Suspension Board. See A. 750a n. 8. The Commission held a full day of oral argument in which all parties participated. The Commission received extensive written materials from all parties concerning the reasonableness of the proposed rates.

On the day after the hearing, the Commission began an investigation of the lawfulness of the proposed rates pursuant to Section 15(1) and (7) of the Act and suspended those rates during the investigation for the statutory period of seven months (A. 623a–646a).

The Commission explained its decision to institute an investigation as follows (A. 624a–626a):

> In order for a rate to be lawful, a primary requirement is that it be just and reasonable * * *. [T]he question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable.

[6] Alaska has a royalty interest in and places a severance tax on the extraction of oil. Its interests are affected because higher transportation rates reduce the wellhead value of the oil itself. Arctic Slope is owed compensation that will be paid at a rate depending on the wellhead value of the oil; a lower wellhead value may mean substantial delay in the payment of compensation. These interests are fully described at Alaska Br. 6–8. See also A. 749a–750a and nn. 6, 7.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carrier's capital costs. They also contend that the cost data provided by the carriers is overstated.

* * * [W]hile there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be appropriate. * * * [W]e conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.[7]

[7] Petitioners' proposed rates were calculated by a method that would have afforded them double earnings on debt capital. In computing their requested return on valuation, petitioners included interest both as part of their return on valuation and as a deductible cost of doing business. But the return on valuation is intended to compensate fully both debt and equity holders. The result was that petitioners were seeking twice the revenue needed to compensate the debt portion of their capital structure. See Alaska Br. 13–15.

The Commission concluded that this was impermissible (A. 632a–633a). It referred, instead, to the standards recently reaffirmed in *Petroleum Products, Williams Brothers Pipe Line Co.*, 355 I.C.C. 479, petition for review pending *sub nom. Farmers Union Central Exchange* v. *Federal Energy Regulatory Commission*, C.A.D.C., No. 76–2138, adjusted upward to take into account the "higher risk factor" involved in operating TAPS (A. 634a). The Commission determined that ten percent was an appropriate return on the investment in TAPS because (1) "the magnitude and inherent attributes of the TAPS project produce a higher risk



The Commission concluded that its power to suspend "any schedule stating a new individual or joint rate, fare, or charge" (Section 15(7)) included the power to suspend initial rates such as those filed by petitioners (A. 626a–627a). The Commission stated that "the maintenance of excessively high rates could act as * * * an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil" (A. 627a). Although the Commission "accept[ed] the basic data supplied by the carriers" (A. 630a), it concluded that in these circumstances, where "the protestants have made a showing of [the] probable unlawfulness" of the rates suspension was preferable to the alternative of a later refund of excessive charges (*id.* at 627a).

In order to permit the pipeline to commence operation prior to the expiration of the seven-month suspension period, the Commission informed the carriers that they could file lower interim rate tariffs (A. 628a–

factor than is normal in crude oil pipeline operations" (A. 634a), and (2) "a 10 percent return on valuation appears generally sufficient to cover estimated capital costs" (A. 635a). The rates the carriers had proposed would have provided much higher returns; the interim rates that the Commission was willing not to suspend (see pp. 11–12, *infra*) provided a composite return on equity of 23.0 percent (A. 635a, 646a).

Petitioners' assertion that the Commission "did not permit the carriers to deduct their interest costs as a cost of doing business" (Br. 11) is therefore misleading. It did not allow a "deduction" because interest costs were included in the ten percent return on valuation. The rate of return therefore was adequate to compensate petitioners for the cost of the debt portion of their capital structure.

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635a) and stated that it would not suspend the interim tariffs if they specified rates no higher than those announced in the order (A. 638a).[8] The Commission anticipated that these rates, computed on the basis of data supplied by the carriers, would allow them at least a 10 percent return on investment. The rates derived from the Commission's formula were (A. 753a):

| | Rates filed by TAPS owners | Rates authorized by order | Reduction |
|---|---|---|---|
| Amerada Hess Pipeline Corp. | $6.44 | $4.85 | $1.59 |
| Arco Pipe Line Co. | 6.04 | 4.91 | 1.13 |
| BP Pipelines Inc. | 6.35 | 4.68 | 1.67 |
| Exxon Pipeline Co. | 6.27 | 5.10 | 1.17 |
| Mobil Alaska Pipeline Co. | 6.31 | 4.84 | 1.47 |
| Phillips Alaska Pipeline Corp.[*] | 6.22 | [4.87] | [1.35] |
| Sohio Pipe Line Co. | 6.16 | 4.70 | 1.46 |
| Union Alaska Pipeline Co. | 6.09 | 4.89 | 1.20 |

* The figures for Phillips were not included in the court of appeals' opinion.

[8] The Commission rejected arguments that it could not properly accept interim rates for the suspension period and that it could not properly announce in advance the rate level that it would be willing to accept without suspension. "These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370" (A. 628a–629a). The Commission explained further: "We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest" (A. 629a).



The Commission "recognize[d] that even the lower interim rate levels may prove upon investigation to exceed reasonable levels" (A. 636a). It therefore stated that it was willing not to suspend the interim rates only if the carriers would agree (1) to keep account of the amounts collected under the interim rates (and under the original rates if they became effective at the end of the seven-month suspension period), and (2) "to refund any portion of such amounts that may ultimately be established as excessive" (A. 636a).[9]

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, with one judge dissenting, denied relief and dismissed the petitions for review (A. 746a–771a). The court determined, on the basis of the language of Section 15(7), the legislative policy underlying the statute, and a comparison of that statute with other statutes conferring authority to suspend rates, that the Commission had power to suspend initial rate tariffs (A. 755a–757a). The court further concluded that the Commission "as [a] corollary to its suspension power had the power to set out allow-

[9] The Commission denied petitions for reconsideration filed by some of the carriers as well as some protestants (A. 775a–781a).

able rate ceilings for the seven-month period which, if filed, it would not suspend" (A. 760a).[10] The court finally held that the refund conditions were "a valid corollary to the suspension power" (A. 761a).

Petitioners then filed interim rate tariffs; the Commission did not suspend those tariffs, and petitioners commenced pipeline operations.

On October 20, 1977, after the court of appeals had denied petitions for rehearing (A. 774a) and motions to stay the mandate and to stay the order of the Commission (A. 773a), this Court stayed the Commission's suspension order pending final disposition of the petitions for certiorari (A. 784a–788a). The stay was conditioned on petitioners' agreement to keep account of charges collected during the pendency of the stay and to refund any portion of such charges that it is ultimately determined they were not entitled to collect.

On November 14, 1977, this Court entered a more complete order allowing petitioners to collect the rates set forth in their initial tariffs, provided that they keep account of sums collected and refund any amounts ultimately found by this Court not to be lawful (A. 785a–788a).

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[10] The dissenting judge was willing to assume, for the sake of argument, that the Commission had the power to suspend petitioners' initial rates (A. 764a). In his view, however, the Commission had no authority to announce its willingness to accept without suspension interim rate filings at the specified level (A. 764a–771a).



## SUMMARY OF ARGUMENT

### I

Section 15(7) of the Interstate Commerce Act empowers the Commission to suspend for seven months, pending completion of an investigation, the operation of *"any* schedule stating a *new* individual or joint rate, fare or charge * * *" (emphasis added). Petitioners' argument that the initial rates at issue here are not "new" rates is contrary to the ordinary meaning of "new." Moreover, the reasons that led Congress to endow the Commission with the power to suspend—protection of the public from possibly unjust rates during the seven-month suspension period and the inadequacy of damages as a remedy—are as applicable to initial rates as they are to increased rates for existing services. There is nothing in the legislative history to indicate that the Commission may not suspend new rates for new services; what legislative history there is on the question contemplates that the Commission may do what it has done here.

Moreover, in Section 216(g) of the Act, 49 U.S.C. 316(g), Congress gave the Commission power to suspend "new rates" of motor carriers but added a grandfather clause, which made this power inapplicable to certain initial rates filed by carriers operating at the time the provision took effect. If initial rates had not been included within the suspension power, there would have been no need for the grandfather clause. Petitioners do not explain why the Commission's interpretation of Section 15(7) as allowing

suspension of initial rates filed by pipelines is unreasonable when Congress itself has interpreted the same language in Section 216(g) as allowing the suspension of initial rates filed by trucking companies.

The facts of this case demonstrate why the suspension power should apply to initial rates and why petitioners are mistaken in urging that the availability of damages is an adequate remedy for problems posed by unjustly high initial rates. Because the delivered price of North Slope crude oil is fixed by the price of oil on the world market, high pipeline transportation charges are not reflected in the price to the consumer but rather in the reduced royalties and taxes paid to the State of Alaska and the Arctic Slope Regional Corporation. Moreover, the owners of the pipeline are subsidiaries of the shippers of the oil, and thus the shippers who pay the higher pipeline transportation costs have little incentive to seek reparations, especially because the subsidiaries would be forced to disgorge excess charges to the State and to the Arctic Slope Regional Corporation. Excessive pipeline rates would also discourage exploration and development by non-affiliated oil producers, whose earnings would be reduced by higher transportation charges. The power to suspend is necessary fully to protect the public interest in cases such as this.

Finally, the Commission consistently has interpreted Section 15(7) as providing the power to suspend initial rates as well as changed rates, and that interpretation is entitled to deference.



## II

Because a decision to suspend rates is based on the Commission's conclusion that the rates, as filed, are apparently too high, the Commission must form at least a tentative view of where the line between "too high" and "not too high" appears to be. Section 15(7) requires the Commission to give reasons for suspending a schedule of rates, and here the Commission stated that the filed rates were apparently too high because they fell on the high side of that tentative line, which it identified. I also stated what could then readily be inferred: that if the carriers filed rates that were on or below that line, the Commission would not suspend them. Nothing in the Act prohibits the Commission from revealing this information. The Commission's statement here simply avoided a wasteful series of filings and re-filings by petitioners. This reasonable action by the Commission is not "ratemaking" but rather "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation." *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514. Any pressure petitioners may have felt to file rates at the level identified in the Commission's order was simply the consequence of the statutory scheme and the financial demands impelling petitioners to transport oil as soon as possible.

## III

The Commission's statement that it would allow the interim rates to go into effect only if the petitioners

agreed to refund any part of the rates ultimately found not to be just and reasonable simply reflects the Commission's decision to give the carriers the benefit of the doubt. The Commission could have required the carriers to collect only a lower rate as a condition of not suspending; it instead allowed them to collect the interim rates at issue here, calculated on the basis of sharply disputed data supplied by them, but found that this would be reasonable only if the Commission could be assured that the carriers would refund any amounts later found, after a full hearing, to be excessive.

A self-executing refund requirement is particularly appropriate in this case for generally the same reasons that suspension was appropriate. The shippers have little incentive to complain of high rates because the excess rates are collected by their subsidiaries. The Commission thus did no more than this Court has done in the past when it has allowed a suspended or enjoined rate to take effect pending the disposition of litigation before the Court. See, *e.g., Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 409 U.S. 801. There is no reason to think that the Commission will apply any refund order so inflexibly that the petitioners will be foreclosed from demonstrating that start-up costs for the pipeline justify early rates somewhat higher than those ultimately approved as permanent rates.



**ARGUMENT**

The issues in this case concern the existence, not the exercise, of the Commission's statutory power. If the Commission was empowered to suspend petitioners' initial rate tariffs, to announce the maximum interim rates it would accept without suspension, and to impose a refund condition on its acceptance of such interim rates without suspension, that is the end of the matter. Neither the lawfulness nor the reasonableness of either the proposed or the interim rates is before this Court.[11]

[11] Suspension orders within the scope of the Commission's power under Section 15(7) are not judicially reviewable. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669; *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 667. See also *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, C.A.D.C., No. 75-1641, decided October 17, 1977, slip op. 10. See also *Port of New York Authority* v. *United States*, 451 F. 2d 783, 786–788 (C.A. 2); *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 980–981 (W.D. Wis.) (three-judge court); *Luckenback Steamship Co.* v. *United States*, 179 F. Supp. 605 (D. Del.) (three-judge court), affirmed in part and vacated in part, 364 U.S. 280; Davis, *Administrative Law Treatise* § 28.16, p. 966 (1970 Supp.).

We agree with petitioners that questions concerning the scope of the Commission's authority may be reviewed; only questions of the propriety or wisdom of its exercise in particular cases are unreviewable under the rule of *Arrow*. Cf. *Adamo Wrecking Co.* v. *United States*, No. 76-911, decided January 10, 1978, slip op. 9–10. Petitioners apparently argue, in addition, that courts may review suspension decisions for reasonableness as well as for statutory authority (Br. 34–35 and n. 50). But *Arrow* indicates the contrary (372 U.S. at 670). Decisions to suspend or not to suspend are unreviewable because the provisions of Section 15(7) represent a "careful accommodation" that would be "disturb[ed]" by judicial review (*SCRAP*, *supra*, 412 U.S. at 697). See also Alaska Br. 30 and n. 44. In any event, the fundamental premise of

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## I

### THE COMMISSION HAD AUTHORITY UNDER SECTION 15(7) OF THE INTERSTATE COMMERCE ACT TO SUSPEND FOR SEVEN MONTHS THE OPERATION OF INITIAL SCHEDULES STATING NEW RATES FOR THE INTERSTATE TRANSPORTATION OF CRUDE OIL BY PIPELINE

Section 15(7) of the Interstate Commerce Act empowers the Commission to suspend for up to seven months, pending completion of an investigation, the operation of "*any* schedule stating a *new* individual or joint rate, fare, or charge * * *" (emphasis added). Petitioners ask this Court to create, as an exception to Section 15(7), a special category of rates—those embodied in a pipeline's initial tariff—that would be wholly exempt from regulation until the Commission could complete a full ratemaking proceeding; as a result, these rates could be as high as the carrier set them. Such a result would be contrary to the national transportation policy "to encourage the establishment and maintenance of reasonable charges for transportation services," note preceding 49 U.S.C. 1, and is

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the court of appeals' opinion was that courts may not review the substance of decisions to suspend or not to suspend. The petitions for certiorari did not challenge that premise, and this Court therefore should not pass on that issue. See Rule 23(1)(c) of the Rules of this Court; *Quilloin* v. *Walcott*, No. 76–6372, decided January 10, 1978, slip op. 7 n. 13. What is more, petitioners do not discuss in any comprehensive way the reasonableness of the Commission's decision, although they repeatedly express their disagreement with it. In these circumstances, then, the only questions requiring decision concern the scope of the Commission's statutory authority.



incompatible with the statutory scheme fashioned by Congress to implement that policy.[12] Petitioners' contention that the Commission is powerless to suspend initial rates under Section 15(7) depends entirely on their argument that initial rates are not "new rates" within the meaning of that section. Petitioners' construction of the statute, however, is contrary to its plain words, to its legislative history, and to the Commission's consistent interpretation of the statute.

#### A. INITIAL RATES ARE "NEW" RATES

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring). Petitioners argue that their initial rates are not "new" rates. But "new" is not an arcane or specialized word. It is not a term of art. If these rates are not new, then "new" has lost all meaning. The rates are as new as new can be, and petitioners cannot change that fact.

Nothing in the ordinary usage of "new" distinguishes the first rate ever (*i.e.*, the initial rate) from a rate that replaces a pre-existing rate (*i.e.*, the changed rate). Both are "new" rates, and petitioners can point to no authority refuting the Commission's

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[12] The result sought by petitioners would also be inconsistent with the recently adopted National Energy Policy to "promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost * * *." Pub. L. 95–91, Section 102(9), 91 Stat. 565.

perfectly conventional interpretation of this perfectly ordinary word.

Indeed, if there were any difficult question of statutory construction here, it would be whether a changed rate for an existing service is a "new rate." The legislative history of the suspension power, which we discuss at pages 26–34, *infra,* shows principally that Congress was at pains to make it clear that "new rate" *included* changed rates. Nothing shows that "new rate" *excluded* initial rates for new services. Because no pertinent legislative history contradicts the apparent meaning of the statute, we believe that the statutory language should be given its ordinary meaning. Compare *United Airlines, Inc.* v. *McMann,* No. 76–906, decided December 12, 1977, slip op. 6–7, and *Swain* v. *Pressley,* 430 U.S. 372, with *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9–25.

### B. CONGRESS INTENDED TO INCLUDE INITIAL RATES IN THE SUSPENSION POWER

#### *1. The purposes of the suspension power are applicable to initial rates no less than to changed rates*

The Interstate Commerce Act prior to 1910 authorized the Commission to set aside an unreasonable rate and prescribe a reasonable rate, and it gave injured persons the right to recover damages incurred by unlawful rates. But principally because of a perceived pattern of abusive rail rate increases, which the Commission was powerless to address until after lengthy



hearings that often consumed months or years, Congress determined that the existing remedies of rate prescription and reparations were not enough to protect the public interest. The public was exposed, from the time a rate was filed until the completion of a hearing, to financial injury from a carrier's collection of excessive charges. Section 15 of the Mann-Elkins Act of 1910, 36 Stat. 552, gave the Commission power to suspend rates pending an investigation of their lawfulness. See generally *United States* v. *Chesapeake & Ohio R. Co.,* 426 U.S. 500 (*Chessie*); *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658.

In granting the Commission this suspension power, Congress intended "to protect the public from the irreparable harm resulting in unjustified increases in transportation costs by giving the Commission 'full opportunity for * * * investigation' *before* the tariff became effective." *Chessie, supra,* 426 U.S. at 513 (emphasis in original; footnote omitted). Congress recognized that the "suspension mechanism [was] a particularly potent tool" that gave the Commission "'tremendous power'" (*ibid.*). Congress considered it essential, however, that the Commission be "provided a 'means * * * for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships.'" *Ibid.*, quoting from 1 Sharfman, *The Interstate Commerce Commission* 59 (1931).

Congress' decision to authorize the drastic remedy of suspension rests on its conclusion that the charging of unreasonable rates causes harm that cannot be repaired by restitution; some of the harm takes place in the economy at large, and reparations to shippers cannot undo damage that may have spread more widely. It rests on Congress' conclusion that full ratemaking takes time and certainly cannot be completed before rates become effective in the first instance. The suspension power enables the Commission to forestall irreparable harm if it can identify in advance rates that appear to be unjust or unreasonable.

Appearances may of course be deceiving; the Commission must act on less than complete information if it is to decide cases expeditiously. Suspensions sometimes will prove to be unnecessary—although failure to suspend also may prove to be unwise. If an unnecessary suspension sometimes causes harm to carriers, there is a countervailing benefit to the public when unjust or unreasonable rates are suspended. Both the carriers' interests and those of the public must be considered, and here, as elsewhere when decisions must be made by governmental agencies, the interests of one group often must be subordinated to the interests of another.

The justifications for the suspension power apply fully to initial rates for new services. The Commission may assess the reasonableness of initial rates just as it may assess the reasonableness of changed rates. The National Transportation Policy does not differentiate



between initial and changed rates, nor does any other provision of the statute (see pages 3–6, *supra*). Initial rates may be excessive, and excessive rates may cause irreparable injury before full ratemaking can be completed. Excessive rates for the movement of oil would decrease the value of oil at the wellhead, and such a decrease would discourage exploration for oil at a time when the Nation needs to promote the discovery of new oil. A decrease in the wellhead value of oil would delay payment of the compensation that is due to the Arctic Slope Regional Corporation. It would affect the tax and royalty revenues of the State of Alaska; the State estimates that every penny of excessive charge would cost it one million dollars yearly (Alaska Br. 7 n. 11). These effects are not easily undone (see pages 37–38, *infra*). Full evaluation of the rates proposed for TAPS will take some time, and so prompt interim action was essential to prevent irreparable injury.[13] If the rates were excessive—or if they reasonably appeared to be excessive—a suspension was justified for the same reasons that a suspension is justified when a carrier increases the rates for an existing service. Cf. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388.

[13] Petitioners opposed a prefiling investigation of TAPS rates, arguing that it would be premature. Petitioner Exxon argued that it would be premature because the Commission could suspend any proposed rates and then study them (see the quotation at Alaska Br. 8 n. 16). Until joining the other petitioners' brief in this Court, petitioner Exxon had not contended that the Commission lacks the power to suspend initial rates.

Petitioners have combed the legislative history of the Mann-Elkins Act of 1910 and the Transportation Act of 1920, 41 Stat. 456, 486, in an effort to find some indication that Congress intended to limit the Commission to suspending changed rates for old services. They have collected a number of references to rate changes and rate increases (Br. 18–26); these references persuasively demonstrate that the Commission may suspend changes and increases. But not one snippet from the legislative history indicates that the Commission may *not* suspend new rates for new services.[14] The absence is telling.

It may be that the absence is explained by the fact that the language of the statute is so plain that it did not require comment; a new rate for a new service is the paradigm of the "new * * * rate" that the statute authorizes the Commission to suspend. Or it may be that the matter escaped comment because Congress did not pay attention to it; when Congress voted in 1910 and 1920 the railroads had been built and transportation of oil by common carrier pipelines was uncommon (see S. Doc. No. 152, 73d Cong., 2d Sess. 53–56

[14] The "authoritative gloss" that petitioners say (Br. 24–26) can be found in the 1920 legislation therefore is an illusion. Congress added to Section 15(7) a proviso that if the investigation were not complete after seven months, the "proposed change of rate" could take effect, but nothing in the legislative history indicates why Congress chose this language or that Congress understood this to exclude initial rates. Developments after 1920 (see pages 28–36, *infra*) demonstrate that Congress understood "new rate" to include initial rates.



(1934)), so that initial rates for new services did not pose a problem requiring comment. But the statutory language is broader than the exigencies of 1910 and 1920; it allows the Commission to suspend any new rate.[15] All rate filings presented the same sort of problem, and all were addressed by the statute.

When legislators did mention the distinction between initial and changed rates, they evidently understood that the power to suspend "new" rates would include the power to suspend a carrier's initial filing. For example, Representative Richardson stated that the proposed legislation would give the Commission "the right to suspend *any* rate that the railroads may see proper to devise or ask to put into effect." Hearings on Bills Affecting Interstate Commerce before House Committee on Interstate and Foreign Commerce, 61st Cong., 2d Sess. 790 (1910). Representative Mann, in explaining the suspension provision on the floor of the House, spoke principally about proposed rate changes but also suggested, by distinguishing between a schedule "proposing to change an existing rate" and "a schedule stating a new rate," that in his view the suspension power would reach all rate filings. 45 Cong. Rec. 4711 (1910).

[15] See *Pfizer, Inc.* v. *Government of India*, No. 76-749, decided January 11, 1978, slip op. 3–4 (Congress did not explicitly consider whether a foreign government may collect damages for violations of the antitrust laws, but the statute should be construed to allow suits by foreign governments because that is most in keeping with its purposes).

Similarly, Section 9 of the Elkins Bill, the pertinent language of which was ultimately enacted as the provision granting the Commission suspension power, was characterized in a summary of the bill as a provision "regulating the filing of new rates *or* changes in old rates." Hearings on S. 3776 and S. 5106 before the Senate Committee on Interstate Commerce, 61st Cong., 2d Sess. 45 (1910) (emphasis added). This use of the disjunctive reflects an understanding that both initial and changed rates were to be subject to the suspension power. Cf. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 565 n. 18.

*2. The language and legislative history of nearly identical sections of other parts of the Act also demonstrate that initial rates are new rates*

Congress demonstrated its understanding that initial rates are "new rates" when it subjected motor carriers, water carriers, and freight forwarders to regulation by the Interstate Commerce Commission. Congress included in each instance a provision giving the Commission the power to suspend rate filings pending a hearing on their lawfulness. Interstate Commerce Act, 49 Stat. 558, 561, as amended and added, 49 U.S.C. 316(g), 318(c), 907(g), 1006(e). These provisions are identical in all material respects save one to Section 15(7). The material difference is that each provision includes a "grandfather" clause making the provision inapplicable to certain "initial



schedules" filed by carriers operating at the time the provision took effect.[16]

For example, 49 U.S.C. 316(g) provides that the Commission may suspend for seven months "any schedule stating a new individual or joint rate, fare, [or] charge" filed by a motor carrier. It goes on to provide, however, "[t]hat this paragraph shall not apply to any *initial schedule or schedules* filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect" (emphasis added).

Congress must have believed that, unless it inserted the qualifying language, the Commission would have had the power to suspend initial rates as well as changed rates. As the court of appeals correctly stated, "[i]f initial rates were not covered there would have been no need for the grandfather clauses" (A. 756a).

When the statute was enacted in 1935, it contained a grandfather clause for all future initial tariffs of carriers in operation in 1935 (49 Stat. 560). Consequently, all initial rate filings by most motor carriers could not be suspended. The Commission's experience during the first few years after enactment, however, led it to recommend that Congress terminate the grandfather treatment in order to end the abuses committed by some carriers who were taking competitive

[16] In the case of 49 U.S.C. 1006(e), the clause exempts from coverage any "initial tariff" filed by a freight forwarder within 90 days after enactment, whether or not it was operating at the time the section took effect.

advantage of the situation. The Commission told Congress: "We believe that the time has passed for permitting initial tariffs to be immune from the suspension power." Hearings on S. 3606 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 3d Sess. 9 (1938). Congress accepted the Commission's recommendation and enacted a termination date for the grandfather protection; the House Committee report stated that the amendment would "permit the Commission to suspend *any initial schedule* of a common carrier * * * filed after the date that the provisions of the bill become effective." H.R. Rep. No. 2714, 75th Cong., 3d Sess. 4 (1938) (emphasis added).[17]

That Congress in 1935 and 1938 interpreted "new rate" to include initial rates lends strong support to the Commission's long-standing interpretation of the same phrase in Section 15(7). "If it can be gathered from a subsequent statute, *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman,* 3 How. 556, 564.[18]

Petitioners do not deny that the Commission is empowered to suspend initial motor carrier rate filings under 49 U.S.C. 316(g) (see Br. 29), nor do they

[17] The Commission frequently suspends initial motor carrier rates under 49 U.S.C. 316(g) (see A. 712a–717a).

[18] See also *Califano* v. *Sanders*, 430 U.S. 99; *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275; *Erlenbaugh* v. *United States*, 409 U.S. 239, 243–244.



dispute the implication that the existence of this power has for the interpretation of the same language in Section 15(7). They advance instead an argument (Br. 29–30) that is not entirely clear. Petitioners seem to contend that: (1) motor carriers, unlike pipelines, must obtain from the Commission a certificate of public convenience and necessity before commencing interstate operation as a common carrier; (2) the Commission, prior to granting such a certificate to a motor carrier, "reviews and approves the new entrant's original rates" (Br. 30); and therefore (3) the Commission's admitted power to suspend those same initial rates "reflect[s] no more than a desire to give the Commission plenary licensing authority" (Br. 30).

This argument fails for several reasons. First, if the Commission "reviews and approves the new entrant's original rates" under its certification authority, why would it need suspension power? Only the *absence* of authority to review rates as part of certification authority would create a need for the more limited seven-month suspension authority. Petitioners themselves acknowledge this flaw in their argument, admitting in a footnote that, if the Commission has already approved an initial rate at the time of certification, "it would be inconsistent for it then to 'suspend' that rate" (Br. 30 n. 43). Petitioners do not explain why Congress would have conferred on the Commission a power to suspend that could not be exercised consistently with the power to certify.

Second, petitioners' argument starts with an incorrect premise. The Interstate Commerce Commission does not "review and approve" a carrier's initial rate at the time of certification.[19] The Federal Power Commission does review rates as part of licensing, and the difference highlights the nature of the Interstate Commerce Commission's authority. The Federal Power Commission was not given authority under the Natural Gas Act to suspend initial rates (see page 36 n. 22, *infra*); protection of the public interest therefore required a review of the proposed rates at the time of certification. *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 390. Because the Interstate Commerce Commission is empowered to suspend initial rates, it did not need authority to consider a carrier's initial tariff as part of certification. Just as the absence of suspension authority under the Nat-

[19] Rates are considered at the time of certification only when it is shown that the rates of existing carriers are so unreasonably high that they constitute an effective embargo against the available traffic. *E.g., Kroblin Refrigerated Xpress, Inc., Extension—Freight Forwarder Traffic,* 123 M.C.C. 831, 841; *Trans-Cold Express, Inc., Extension—Indiana,* 98 M.C.C. 10, 12; *H. L. & F. McBride Extension—Ohio,* 62 M.C.C. 779, 790. Even then, the carrier's initial rate is not "approved"; it must be filed and remains subject to the Commission's suspension power.

The case relied on by petitioners (Br. 30 n. 43)—*West Coast Bus Lines, Ltd., Common Carrier Application,* 41 M.C.C. 269—does not stand for the principle for which it is cited. The applicant's proposed rates were reviewed (not approved) by the Commission because the applicant sought certification on the strength of its lower rates and to that end voluntarily submitted to the Commission the initial rates it proposed to charge.



ural Gas Act magnifies the importance of an initial rate review prior to certification, so too does the absence of certification authority under Part I of the Interstate Commerce Act magnify the importance of the Commission's suspension power to protect the public from excessive initial rates.

Third, petitioners' argument concerning the motor carrier grandfather clause misses the point. Whatever Congress may have intended in giving the Commission authority to suspend initial motor carrier rate filings, and even accepting *arguendo* petitioners' apparent contention that Congress had different objectives for pipelines, the fact remains that the critical language of Section 316(g) allowing suspension for motor carriers is identical to that in Section 15(7) allowing suspension for pipelines. Petitioners do not explain why the Commission's interpretation of Section 15(7) as allowing suspension of initial rates should be viewed as unreasonable when Congress itself interpreted the same language in Section 316(g) as allowing the suspension of initial rates.[20]

[20] Petitioners find significance in the fact that pipelines are not licensed (Br. 30–31). But licensing decisions ask the question whether the public interest would be served by allowing a new carrier to offer transportation services in a particular market; the Commission may exclude a proposed new service. Suspension of rates has little to do with the question whether a new competitor should enter a market. The suspension decision concerns only the probable lawfulness or unlawfulness of the proposed rate. It is made whether or not the common carrier holds some kind of license. Suspension decisions never could bar entry for more than seven months and are unlikely even to postpone entry; even after

Section 316(g) also answers petitioners' contention (Br. 24–26) that the 1920 amendment to Section 15(7) placed an "authoritative gloss" on the meaning of "new rate." The Transportation Act of 1920 added to Section 15(7) a clause providing that, if a rate investigation has not been completed and an order made within the suspension period, "the proposed change of rate * * * shall go into effect at the end of such period." 41 Stat. 486–487. Petitioners argue that the phrase "proposed change of rate" was meant to be "interchangeable" with "new rate" and that "new" must therefore mean only "changed" (Br. 17).

Whatever superficial plausibility this argument may have fades when one refers to Section 316(g). It contains precisely the same clause: if the investigation has not been completed and an order made within the suspension period, "the proposed change of rate * * * shall go into effect at the end of such period." Petitioners concede that Congress intended to permit the Commission to suspend any initial schedule of a motor carrier filed after July 1, 1938. See also H.R. Rep. No. 2714, *supra*, at 4. Congress thus does not attribute to the "proposed change" clause in Section 316(g) the significance that petitioners ask this Court to give to the same clause in Section 15(7). If, as petitioners

a rate has been suspended, a carrier may file immediately another tariff stating different rates, and the Commission may determine not to suspend it. The fact that a particular rate proposal has been suspended does not mean that *no* rate may be charged for the full period of suspension.



suggest, "proposed change" and "new rate" mean the same thing, it is most logical to conclude that "change" was used in its literal sense to denote not only a change from one rate to another but also a change from no rate to an initial rate.

*3. The practice under analogous statutory schemes supports the Commission's interpretation of Section 15(7)*

The Commission's interpretation of Section 15(7) is fortified by the treatment of initial rates under similar legislation administered by other agencies. For example, under Section 204 of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. 204, prior to its amendment in 1976, the Federal Communications Commission was empowered to suspend for up to three months "any new charge" filed with that agency by a carrier subject to its jurisdiction. The Communications Commission has always understood that suspension power to embrace both initial and changed rates.[21] In 1976 Section 204 was amended to extend the agency's suspension period and to expand its power to order the payment of refunds. Congress stated its understanding that the Communications Commission already had the power to suspend initial rates. See H.R. Rep. No. 94–1315, 94th Cong., 2d Sess. 4, 6 (1976); S. Rep. No. 94–918, 94th Cong.,

[21] See, *e.g.*, *American Telephone & Telegraph Co.*, 50 F.C.C. 2d 501, 510–511; *Western Union Telegraph Co.*, 47 F.C.C. 2d 639, 640; *Communications Satellite Corp.*, 38 F.C.C. 1286, 1293–1295; *Western Union International, Inc.*, 28 F.C.C. 2d 727, 31 F.C.C. 2d 554.

2d Sess. 3, 4 (1976). Congress changed the language of the section to make the meaning even clearer: Section 204 now provides that the Communications Commission may order refunds in the case of a proposed "charge for a new service *or* an increased charge" and that it may suspend "any new *or revised* charge." Pub. L. 94–376, 90 Stat. 1080, 47 U.S.C. (1976 ed.) 204(a) (emphasis added). These "minor language changes" were intended to "clarify" existing law. H.R. Rep. No. 94–1315, *supra,* at 6; S. Rep. No. 94–918, *supra,* at 7. Congress has demonstrated beyond doubt that an initial charge filed with the Communications Commission is a "new charge" for purposes of the suspension power. The result should be no different here.

On the other hand, when Congress has intended to exclude initial rates from the reach of an agency's suspension power, it has done so unambiguously. Section 1002(g) of the Federal Aviation Act of 1958, 72 Stat. 790, 49 U.S.C. 1482(g), which gives the Civil Aeronautics Board authority to suspend "new" rates, expressly excludes from that power "any initial tariff filed by any common carrier." The absence in Section 15(7) of any similar exclusion supports the conclusion that Congress did not intend there to be one.[22]

### C. THERE IS NO PERSUASIVE REASON WHY THE SUSPENSION POWER SHOULD NOT APPLY TO INITIAL RATES

Petitioners advance a number of arguments that are designed to show that it is unnecessary or unwise to

[22] Petitioners argue (Br. 28) that the Federal Power Commission ruled that it was without authority to suspend initial rates, and that this decision is relevant to the issues of the present case. But a dispositive difference between the statutes explains the apparent discrepancy. Under Section 205(d) of the Federal Power Act, as added, 49 Stat. 851, 16 U.S.C. 824d(d) and under Section 4(d) of the Natural Gas Act, 52 Stat. 822, as amended, 15 U.S.C. 717c(d), no change may be made in any rate except on 30 days' notice, to "be given by filing * * * new schedules stating plainly the *change or changes* to be made in the schedule or schedules *then in force*" (emphasis added). Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), and Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), give the Federal Energy Regulatory Commission authority to suspend "such new schedule[s]." Thus the suspension authority apparently extends only to "such new schedule[s]," *i.e.*, schedules stating changes "to be made in the schedule or schedules then in force." This authority is therefore inapplicable to initial schedules (which do not change schedules already in force) and the former Federal Power Commission's ruling to that effect is of no help to petitioners. Moreover, the Federal Energy Regulatory Commission has not yet decided to follow the old Power Commission's construction of its authority, and, if the new Commission should conclude that it may suspend initial rates, the disparity perceived by petitioners would vanish.



suspend initial tariffs. These arguments may be appropriate for a legislative forum, but they do not detract from the fact that Section 15(7) authorizes the suspension of initial rates. In any event, the objections are unpersuasive.

#### *1. The availability of reparations does not make suspension inappropriate*

Judge Roney, dissenting on the court of appeals, argued (A. 762a–771a) that, because the Commission could order the refund of charges collected under what ultimately may be found to be excessive rates, it should not have suspended the rates. To suspend, Judge

Roney argued, exposes the carrier to a risk of irreparable loss (because it cannot recoup if the suspension should prove to have been unnecessary) while offering no benefit to shippers. Petitioners echo this argument (*e.g.*, Br. 24).

This argument offers no reason to distinguish between initial rates and changed rates; the Commission may order a refund or the shippers may seek reparations in either case if the charges are found to have been unjust or unreasonable[23] and in either case the suspension irreparably denies revenues to the carriers. The argument therefore offers no support to petitioners, who concede (as they must) that changed rates may be suspended and argue only that initial rates are different. More than that, however, this argument simply ignores the conclusion of Congress that reparations often are insufficient to undo the damage caused by overcharges. That, after all, is why Congress authorized the Commission to suspend rates. *Chessie, supra,* 426 U.S. at 512–513 and n. 10.[24] As the court of appeals concluded (A. 757a):

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection [*i.e.*, the suspension power] is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

[23] See Sections 8 and 9 of the Act, 49 U.S.C. 8 and 9.

[24] Cf. *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524 ("the possibility of refund does not afford sufficient protection"); *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 ("experience has shown [the protection of refunds] to be somewhat illusory").



This case illustrates why the suspension power may serve interests other than protecting the short-run financial welfare of shippers. The price of North Slope oil, as delivered to refineries, is fixed by the price of oil in the world market (see Br. 8 n. 9). This means that the wellhead value of Alaskan crude goes down as the pipeline transportation charge goes up. Moreover, the owners of the pipeline are subsidiaries of the shippers of the oil (see pages 7–8 and n. 4, *supra*); in practical effect, then, the shippers are charging themselves for the transportation. Because of these circumstances, neither the shippers (the parent companies of petitioners) nor the consumers have a direct interest in the rates for transportation.[25]

But the cost of transportation may be a formidable obstacle to the development of new oil. Because high transportation costs decrease the value of the oil itself, they make it less attractive to explore for or produce oil. The Commission found that "the maintenance of excessively high rates could act as a deterrent * * * to the use of the pipeline by non-affiliated oil produc-

[25] No North Slope oil producer protested the tariffs filed by petitioners, and none has intervened in the judicial proceedings.

ers" (A. 627a), and excessive charges could delay the development of much-needed energy. The cost of transportation also affects the State of Alaska and the Arctic Slope Regional Corporation (see page 25, *supra*), because it converts oil revenues (which are taxed and subject to royalties) into transportation revenues (which are not).

Reparations to shippers would do little to overcome damage done to these interests. Indeed, because of the near-identity of interest between shippers and carriers, the shippers might not even seek reparations if the rates were found to be excessive; any reparations could be taxed or subject to royalty payments to the State of Alaska, while the same money in the hands of the carriers would not be taxed or subject to royalty. We do not suggest that the possibility of reparations is useless, but it is not enough to provide the protection that Congress concluded was necessary.

*2. Suspension of initial rates does not prevent the provision of new service*

Petitioners make much of the fact that suspension of a changed rate simply preserves the *status quo* (*e.g.*, Br. 15–16, 18, 22–24, 32–33). Suspension of an initial rate, they contend, has a much more dramatic effect: it prevents the transportation service from operating at all. Petitioners urge that this difference calls for different treatment of initial and changed rates under Section 15(7).

This argument overlooks the fact that initial rates of motor carriers are suspended under language identical in all material respects to that of Section 15(7) (see pages 28–34, *supra*). Although it might be possible to distinguish between initial rates and changed rates because of the supposed difference to which petitioners refer, the fact remains that Congress did not do so.



Petitioners' argument fails for other reasons as well. Non-operation of a new service, like operation of an old service at existing rates, is the *status quo ante;* it is misleading to say that suspension of a changed rate "preserves" the *status quo* while suspension of an initial rate has some different effect. In either event, the suspension frustrates the desire of the carrier to charge a particular rate and leaves things as they were. In some cases, indeed, the suspension of a proposed increase in the rate for an existing service might leave that service unprofitable and cause the discontinuation of the existing service.

Most importantly, however, this case demonstrates that the suspension of a proposed initial tariff does not mean that the proposed service cannot operate at all. The suspension is based on the conclusion that a particular proposed rate is probably excessive, not on a conclusion that the proposed service should not be offered. The Commission therefore allows the carrier to refile a tariff with rates that do not appear to be excessive. Once this has been done, the service may be offered. Petitioners have other objections to the procedure under which the Commission informed them that some rates would not appear to be excessive; we discuss these objections at pages 44–51, *infra*. But the

point is that petitioners cannot argue that the suspension of initial rates amounts to a prohibition against the offering of a new service. The premise of petitioners' argument is incorrect, and its conclusion therefore is unsupported.

### D. THE COMMISSION'S CONSISTENT EXERCISE OF THE POWER TO SUSPEND INITIAL RATES IS ENTITLED TO DEFERENCE

If there is any doubt about the power to suspend initial rates, that doubt should be dispelled by the Commission's exercise of that power for several decades, by Congress' disinclination to deprive the Commission of that power, and by the deference traditionally accorded to an agency's consistent interpretation of the statute it administers.[26]

The Commission consistently has held that the phrase "new * * * rates" in Section 15(7) includes "both changed and initial" rates. *Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo,* 321 I.C.C. 564, 566. The Commission first suspended an initial rate no later than 1918; in *Cotton from New Orleans,* 49 I.C.C. 751, the Commission suspended a tariff that "proposed * * * to establish on file with us for the first time port-to-port rates from New Orleans to New York" for certain commodities (*id.* at 751). As a result of the suspension, "the situation was continued

[26] See, *e.g., National Labor Relations Board* v. *Enterprise Association,* 429 U.S. 507, 528; *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381; *Udall* v. *Tallman,* 380 U.S. 1, 16; *Massachusetts Trustees* v. *United States,* 377 U.S. 235, 241–245; *United States* v. *American Trucking Associations,* 310 U.S. 534, 549.



whereby no port-to-port rate was on file with us" (*id.* at 752).

The Commission, recognizing that the rates in issue were "initial rates, not increased rates" (*id.* at 753), expressly rejected an argument, like the one advanced here by petitioners, that the rates were not "new" within the meaning of the statute and that the Commission's "suspension power is limited to an increase in rates previously on file and subject to its jurisdiction" (*id.* at 752). The Commission held, to the contrary, that "new" rates include initial rates, that the rates at issue were "new rates in the sense that respondent had not previously filed its port-to-port rates with the Commission," and therefore that "[t]he Commission's jurisdiction over these rates * * * is clearly full and complete" (*ibid.*).[27]

The Commission has never departed from this straightforward assertion of power to suspend initial rates under Section 15(7),[28] and its assertion of authority therefore is entitled to "great deference." *Udall* v. *Tallman,* 380 U.S. 1, 16.[29]

[27] Mr. Justice Black recognized that the Commission's decision in that case involved "initial rates." *Chicago & Eastern Illinois R.R.* v. *United States,* 375 U.S. 150, 158 (dissenting opinion).

[28] See also *Bituminous Coal Via Motor-Rail from Lynnville, Indiana to Chicago, Illinois,* 313 I.C.C. 573 (suspension of initial motor-rail rate under both Section 15(7) and Section 216(g)); *Machinery from Salt Lake City—International Transport, Inc.,* 304 I.C.C. 286. Other cases are collected at Alaska Br. 48–52.

[29] Petitioners mistakenly rely (Br. 27) on *Restriction in Routing between Greenwood and Augusta,* 165 I.C.C. 3, affirmed *sub nom. Atlantic Coast Line R.R.* v. *United States,* 48 F. 2d 239

## II

### THE COMMISSION HAS THE AUTHORITY TO TELL CARRIERS THAT IT WILL NOT SUSPEND INTERIM RATES THAT DO NOT EXCEED A PARTICULAR LEVEL

If the Court holds, as we have argued above, that the Commission may suspend initial rates, then it also must consider petitioners' argument (Br. 32–42) that

(W.D. S.C.), affirmed, 284 U.S. 288. The issue in that case was not whether an initial rate is a "new" rate. Indeed, the focus was on a different portion of Section 15(7)—that which empowers the Commission to suspend a schedule stating a "new * * * regulation or practice affecting any rate, fare, or charge." The Commission viewed all the schedules at issue as stating "new regulation[s] or practice[s]"; it found that it was without jurisdiction to suspend some of the schedules, however, because they did not affect "any existing rate, fare, or charge" (165 I.C.C. at 4). Insofar as the decision bears upon the present case at all, it supports rather than contradicts the Commission's long-standing interpretation that "new" rates embrace initial ones.

*In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, also cited by petitioners (Br. 27), does not support their position. The carrier in that case, after operating for some years in the mistaken belief that it was not subject to the Act, prepared and filed its initial tariff schedules. Other parties protested and asked the Commission to suspend the schedules. The Commission declined to do so, noting that suspension would leave the company with no lawful rates in existence and would oblige it either to cease operations or to violate the Act (23 I.C.C. at 537). The Commission did not state or imply that it was without power to suspend; on the contrary, it assumed that it had the power but simply determined not to exercise it under the circumstances presented.

The other Commission decisions to which petitioners point (Br. 27 n. 38) have nothing to do with the power to suspend initial



the Commission exceeded its authority by telling the carriers that, if they proposed interim rates less than a particular level, it would not suspend those rates. We submit that petitioners' arguments in this respect are incorrect.

#### A. THE COMMISSION MAY ANNOUNCE THAT IT WILL NOT SUSPEND PARTICULAR RATES

There is a short answer to petitioners' labored argument that the Commission may not announce that it will not suspend tariffs proposing rates lower than a specified level.

The reason for giving the Commission the power to suspend is that it may be necessary to prevent certain rates, which appear to be excessive, from going into effect. The foundation for a suspension is the Commission's conclusion that the proposed rate appears to be unjust or unreasonable. The Commission's decision to suspend particular rates as apparently too high implies that other rates would not be too high. The Commission must form at least a tentative view about where the line between "too high" and "not too high" appears to be. Section 15(7) requires the Commission to give reasons for suspending a schedule of rates. One compelling reason is that the proposed rates are on the high side of the line tentatively identified; the Commission's statement of reasons is made

rates. Petitioners' strained reading of dicta in those decisions does not support their contention that the Commission viewed itself to be powerless to suspend initial rates.

more complete if it identifies where the apparent dividing line is.[30]

That is all the Commission did here. It told the carriers where one line between excessive and reasonable rates might be, based on its preliminary study, and it told the carriers that if they filed rates no more than that amount, it would not suspend them.[31] Petitioners' real complaint, then, is that the Commission exposed *too much* of its reasoning process and complied too completely with the requirement that it state reasons for its decisions.

The Commission could, of course, have remained silent concerning the interim rate level it would find acceptable. If it had, petitioners would have been required, if they wished to commence operations during the suspension period, to speculate about the maximum rates the Commission would allow to take effect. That speculation might have led to multiple refilings and successive suspensions until petitioners

[30] The statement of reasons need not be as elaborate as it was in this case. See *Port of New York Authority* v. *United States*, *supra*, 451 F. 2d at 786 n. 16; Pet. Br. 33 n. 49. But because of the importance of TAPS, the Commission concluded that it should state its reasons as completely as possible and specify the line it had tentatively identified.

[31] Nothing in the statute prohibits any carrier from filing a new tariff containing lower rates after a previous tariff has been suspended. Cf. Section 6(7) of the Act, 49 U.S.C. 6(7). Petitioners seem to contend (Br. 36) that the Commission was forced to decide between suspension with no possibility of refiling and no suspension at all. But the statute does not create an all-or-nothing choice, as the court of appeals recognized (A. 759a–760a). See also *Chessie*, *supra*.



finally hit upon an acceptable rate level. See, *e.g.*, *Clay From Greybull, Wyo., to Points in the Middle West,* 314 I.C.C. 705. That time-consuming exercise would have been both pointless and contrary to Congressional policy, which favors "[t]he early development and delivery of oil * * * from Alaska's North Slope to domestic markets." 43 U.S.C. (Supp.V) 1651(a).

In order to avoid the prospect of cascading tariff filings, and to be as explicit as possible concerning the reason why (and extent to which) it believed petitioners' original rates to be excessive, the Commission simply stated in its order the rate levels that, if filed, it would allow to go into effect without suspension during the seven-month period (A. 638a). The Commission's reasonable action should not expose it to petitioners' present charge of usurpation of power.

Even if the Commission had not specified acceptable interim rate levels—*i.e.*, ones that it would not find to be probably unlawful—its statement of reasons for suspending petitioners' original schedules necessarily would have suggested the acceptable interim rate levels. It would have taken only a simple computation to make the necessary determination.

### B. THE COMMISSION'S ANNOUNCEMENT THAT IT WOULD NOT SUSPEND PARTICULAR RATES IS NOT UNAUTHORIZED "RATEMAKING"

Petitioners argue that the Commission's procedure here amounted to "ratemaking" that was conducted without the statutory requirement of full adversarial hearings. This argument fails at the threshold, be-

cause no rates have been "made." The Commission simply told petitioners how best to take advantage of a procedure that is their statutory right—to file additional tariffs. The fact that the Commission may tell the carriers in advance that it will not suspend the tariffs does not make the invitation unlawful.[32] To the contrary, this Court sustained the validity of such an invitation in *Chessie,* describing it as "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation" (426 U.S. at 514). The Commission followed a "measured course * * * offer[ing] an alternative tailored far more precisely to the particular circumstances presented" (*ibid.*). See also *In re North American Light & Power Co.,* 170 F. 2d 924, 930–931 (C.A. 3); *Port of New York Authority* v. *United States,* 451 F. 2d 783, 785–786 (C.A. 2), both of which sustain similar decisions.

Petitioners confuse the prescription of rates, which is the final approval of rates as lawful after a hearing held pursuant to Section 15(1) of the Act, with the acceptance of a rate tariff, without a prior hearing but subject to a subsequent determination of lawfulness.

[32] Petitioners' unhappiness about the lack of a "hearing" prior to the Commission's suspension order (Br. 36–42) overlooks the purpose of suspension. It is designed to be a summary remedy, though a temporary one. It enables the Commission to act promptly on evidence less substantial than that necessary for the imposition of permanent rates. Section 15(7) sanctions this result by allowing the Commission to suspend a tariff "pending [a] hearing * * * concerning the lawfulness" of the tariff. Permanent rates will be set only after full hearing, which is now in progress and will continue for several months.

The Commission's suspension order, furthermore, was based on a considerable amount of data and argument from petitioners as well as from protestants. See generally App. 4a–577a and Volume III of the Appendix, which contains the oral argument and exhibits presented to the Commission prior to its order.



The Commission's acceptance of petitioners' interim rate tariffs was not a determination of the lawfulness of the rates set forth in those tariffs. To the contrary, the lawfulness of petitioners' rates will be determined only after investigation and hearing. The acceptance of rate tariffs pending a subsequent determination of lawfulness need not itself be preceded by a hearing. See Sections 6(1) and 15(7) of the Act. The fact that the tariffs accepted by the Commission were not petitioners' first choice does not alter the matter; as in *Chessie,* the Commission had authority to suspend one tariff and accept another without a prior hearing, subject to the protections offered by a subsequent hearing on the question of the lawfulness of the carriers' rates.

Petitioners rely (Br. 41–42) on *Moss* v. *Civil Aeronautics Board,* 430 F. 2d 891 (C.A.D.C.), but to the extent *Moss* purports to place general limitations on a regulatory agency's ability to use its suspension power to induce the filing of a modified rate tariff, it is inconsistent with this Court's subsequent decision in *Chessie.* In any event, the evil that concerned the court in *Moss* is not present here. In *Moss* the court suspected that a regulatory agency had connived, in *ex parte* meetings with members of the regu-

lated industry, to implement a significant revision of the agency's overall practices with respect to the setting of permanent rates in a manner that would effectively insulate those rates from any judicial inquiry into their lawfulness. See 430 F. 2d at 893–894, 900–902. In contrast, in this case there is no suggestion that the interest of the public has been subordinated to that of the regulated industry as a result of *ex parte* dealings; only temporary rates have been authorized, and once permanent rates are fixed they will be subject to full judicial review. These facts would not invoke the *Moss* doctrine, which serves only to "[extend] judicial power where an agency is using the suspension authority so as to avoid or limit the judicial review provided by Congress * * *." *Continental Air Lines, Inc.* v. *Civil Aeronautics Board,* 522 F. 2d 107, 131 (C.A.D.C.) (Leventhal, J., concurring).[33]

The "coercion" of which petitioners complain (Br. 41) flows, if at all, not from the Commission's statement of the maximum interim rates it would accept without suspension but from the suspension itself. Whatever economic compulsion petitioners may have

[33] The procedure the Commission followed here resembles the practice of the Civil Aeronautics Board following *Moss*. After the Board entered the orders that gave rise to *Moss*, it instituted a general inquiry into airline ratemaking. Orders 70–1–147, 70–1–148, 70–2–121, *Civil Aeronautics Board, Domestic Passenger Fare Investigation*, pp. 1, 7, 17, 673. In 1971 it issued an opinion and order holding that 12 percent is the maximum reasonable rate



felt to file interim tariffs,[34] they presumably would have felt just as strongly if the Commission had suspended the initial rates without indicating what interim rates it might find acceptable. The pressure petitioners perceived was the consequence of the statutory scheme and the financial demands that impelled them to begin transporting oil as soon as possible; it was not created by any unauthorized action of the Commission.

of return for carriers in their domestic passenger air service. Order 71–4–58, Phase 8—Rate of Return (April 9, 1971). The Board has since routinely suspended rates for domestic passenger service that produce returns in excess of 12 percent. See, *e.g.*, CAB Orders 77–6–109, 77–5–62, 76–6–173, Domestic Passenger-Fare Increase Proposed by Various Carriers; 76–5–93, Domestic Passenger-Fare Increase Proposed by Eastern Airlines, Inc. Likewise, the Commission here, through long practice, has established a rate of return standard that it enforced in this case by suspending rates that appeared to exceed that standard. See A. 633a–635a.

[34] Petitioners' assertion (Br. 8–9, 41) that they were threatened with criminal prosecution if they failed to file interim tariffs adopting the rates specified by the Commission is groundless. It was only after petitioners, at oral argument before the Commission, threatened to refuse to operate the pipeline if their initial rates were suspended that counsel for the Commission's Bureau of Investigations and Enforcement and the Department of Justice, in answer to questions raised by the Commission, pointed out that such a refusal might constitute an enjoinable violation of common carrier obligation or of the antitrust laws. Criminal prosecution was never suggested. See Transcript of Oral Argument 80, 119–121, 145–149, Exhibit 1 of Appendix. The Commission's suspension order did not address the question whether the carriers would have an obligation to file interim tariffs; its language was permissive throughout.

## III

### THE COMMISSION HAD AUTHORITY TO CONDITION ITS ACCEPTANCE OF INTERIM RATE FILINGS WITHOUT SUSPENSION ON THE CARRIERS' AGREEMENT TO REFUND ANY CHARGES IN EXCESS OF THE LEVELS ULTIMATELY FOUND TO BE JUST AND REASONABLE

The Commission recognized that "even the lower interim rate levels [that it was willing not to suspend] may prove upon investigation to exceed reasonable levels" (A. 636a). It therefore conditioned its willingness to accept the filing of interim rate schedules without suspension on a "require[ment] that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive" (*ibid.*).[35]

Petitioners argue that the Commission could not lawfully ask them to agree to this condition because the statute does not expressly authorize the Commission to enter refund orders with respect to initial rates (Br. 42–46). The court of appeals, relying on this Court's decision in *Chessie,* which specified the manner in which certain revenues were to be spent, correctly rejected this contention (A. 760a–761a).

The willingness of carriers to agree to refund charges ultimately found to have been excessive may

[35] As the court of appeals noted, "if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect" (A. 760a n. 15). See A. 628a.



bear directly on the reasonableness of the Commission's decision to allow particular rates to go into effect without suspension. It allows the Commission to give carriers the benefit of the doubt. In the present case, for example, although the Commission concluded that a return of 10 percent on valuation would be fair, it was willing to allow the carriers to implement interim rates that were calculated on a rate base including the investment and cost claimed by the carriers (A. 635a, 646a). The Commission was faced with a choice; it could allow the carriers to collect only the rate that would produce no more than a 10 percent return on the rate base that might eventually be established as proper, or it could give them the benefit of the doubt and allow them to institute some higher rate calculated on their claimed costs. The latter course would be reasonable for the Commission to follow only if it could be assured that the carriers would refund any amounts determined to be excessive.

The Commission did not assert the power to impose a condition unrelated to the purpose of a suspension order. On the contrary, refund conditions are natural concomitants of suspension orders. Like suspension itself, they are designed to protect the public from the injury that results from unreasonably high rates.

Moreover, a self-executing refund requirement is particularly appropriate in the circumstances of this case for generally the same reasons that made suspension appropriate (see pages 38–39, *supra*). The shippers

are in large part affiliated with the carriers and the persons directly affected by unreasonably high rates include the holders of royalty interests and taxing authority. In the absence of a refund requirement, the carrier-affiliated shippers have little incentive to initiate separate reparations actions against the carriers with which they are affiliated, since a reparation order would divert revenues from the affiliated companies to holders of royalty and tax interests. Furthermore, it is not settled that the royalty owners and taxing authority could properly recover reparations in their own right. The Commission's refund condition, like its suspension order, was thus "tailored * * * precisely to the particular circumstances presented" and was a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation" (*Chessie, supra,* 426 U.S. at 514).

This Court has imposed similar conditions on its willingness to allow a suspended or enjoined rate to take effect pending disposition of litigation before the Court. For example, in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 409 U.S. 801, the Court stayed a district court's judgment enjoining the imposition of certain railroad charges that the Commission had declined to suspend. As a condition of the stay, the Court directed the affected railroads to keep account of pertinent amounts collected during the existence of the stay and, if the district court's order were ultimately affirmed, to make "refund (with



interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds" (409 U.S. at 801–802).

Similarly, in the present case the Court conditioned its stay of the Commission's suspension order on "petitioners' agreement to keep account of the amounts collected under the proposed rates * * * and their agreement to refund any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect" (A. 784a).[36]

We do not suggest that the Commission's power to impose reasonable conditions on its acceptance of a rate filing without suspension is necessarily coextensive with this Court's power to enter orders in aid of its own jurisdiction. What these two cases illustrate, however, is that this Court, in circumstances like those in the present case, has determined that a refund condition, although not expressly authorized by statute, is an appropriate mechanism for minimizing the injury to the public that could result from allowing a possibly excessive rate to take effect.

Petitioners' principal objection to the refund condition seems to be that it allegedly departs from the

[36] The Court thereafter entered a more detailed order further effectuating the initial stay order (A. 785a–788a). The later order provides (A. 786a): "In the event certiorari is denied or it is otherwise ultimately determined that [petitioners] were not lawfully entitled to collect a portion of the rates so collected, the pipeline companies shall refund such portion of said rates, with interest * * * to the persons entitled thereto without further order of this Court."

statutory standard governing liability for reparations. The Commission's refund condition, according to petitioners, would require calculation of refunds solely by reference to the rate ultimately prescribed for the future, while the reparations standard under Sections 8 and 9 of the Act, 49 U.S.C. 8 and 9, would calculate damages by reference to the possibly different rate level that may have been just and reasonable during the present stages of the pipeline operation (Br. 44–46). In our view, petitioners are reading too much into the Commission's order.

Petitioners focus on the following language in the order: "The interim tariffs [should] contain a refund provision to the effect that if the rates charged exceed the rates subsequently authorized or prescribed * * *, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed" (A. 638a). Even if this language may be susceptible to the rigid interpretation that petitioners fear, there is no reason to assume that it will be applied so inflexibly. Indeed, elsewhere in the order, the Commission spoke more generally of the carriers' agreement "to refund any portion of such amounts [collected under the interim rates] that may ultimately be established as excessive" (A. 636a).

We agree with petitioners that the rate ultimately prescribed for the future will undoubtedly "bear a close relationship to the maximum rate that would have been lawful in prior periods, [but that] the two need not be the same" (Br. 45). Yet the refund obligation imposed by the Commission will not foreclose petitioners from attempting to demonstrate that, in the circumstances of this case, the two are in fact different, and that that difference justifies a somewhat higher rate for early stages of the pipeline's operation.



Petitioners' final argument (Br. 43–44) is that the Commission's requirement that they undertake to refund amounts they should not have collected is an "unconstitutional condition." It is not clear to what extent this doctrine is persuasive even in constitutional cases.[37] But petitioners have not been called on to surrender a constitutional right; they have no constitutional right to retain overcharges. They have simply been put to a hard choice. If they desire to collect rates that may eventually prove to be excessive, they must agree to pay back any amounts they should not have collected. The refund condition is no different in principle from the condition sustained in *Chessie*; it may make the prospect of collecting the rates less attractive to the carriers, but the condition is intimately related to the Commission's duty to as-

[37] See *Buckley* v. *Valeo*, 424 U.S. 1, 57 n. 65, 97–104, which holds that, although candidates have a First Amendment right to spend as much money as they please to promote their own candidacy, Congress may require them to surrender this constitutional right as a condition of receiving public funds with which to campaign. See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 316–320; *McGautha* v. *California*, 402 U.S. 183, 208–220.

sess the reasonableness of proposed rates and to ensure that the funds are not improperly collected or retained.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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